

STATE OF MICHIGAN
COURT OF APPEALS

ALICE ROSE B. VETTRAINO,

Plaintiff-Appellee,

v

DEWITT PUBLIC SCHOOLS and DEWITT
PUBLIC SCHOOLS BOARD OF EDUCATION,

Defendants-Appellants.

UNPUBLISHED

May 17, 2012

No. 304280

Clinton Circuit Court

LC No. 10-010770-CZ

Before: OWENS, P.J., and TALBOT and METER, JJ.

PER CURIAM.

Dewitt Public Schools and Dewitt Public Schools Board of Education (“Dewitt”) appeal as of right the trial court’s grant of summary disposition, attorney fees and costs in favor of Alice Rose B. Vettraino. We reverse and remand for proceedings consistent with this opinion.

Vettraino’s husband, Douglas Vettraino, was employed by Dewitt. In a letter to Dewitt dated October 22, 2008, Douglas Vettraino made numerous allegations against Dewitt’s Director of Finance, William Melching. In March 2010, in response to Douglas Vettraino’s letter, Dewitt retained a licensed professional investigation agency to investigate the allegations. Numerous witnesses were interviewed by investigators and the witnesses agreed to speak to investigators on the condition of anonymity.¹

The investigators submitted an initial written report to Dewitt on March 24, 2010, and a supplemental report on April 15, 2010. The reports concluded that the allegations made by Douglas Vettraino were unfounded. The reports also recommended Douglas Vettraino’s termination for cause.²

¹ The witnesses’ identities were not to be disclosed beyond the Dewitt Public Schools Board of Education and its administrators.

² Dewitt declined to renew Douglas Vettraino’s contract on February 8, 2010, prior to the submission of either investigative report. Douglas Vettraino’s contract expired on June 30, 2010.

On April 27, 2010, Alice Rose Vettraino submitted a Michigan Freedom of Information Act (“FOIA”) request for all materials related to the investigation, including the investigative reports. Dewitt denied Vettraino’s request for the investigative reports, stating that the reports were not subject to the FOIA because they were protected by the investigator-client privilege. On July 26, 2010, Dewitt voted to release the investigative reports pending permission from the individuals who were interviewed. On August 23, 2010, Dewitt made a summary of the investigative reports available to the public on the Dewitt Public Schools website. Vettraino then submitted a second FOIA request on August 25, 2010. On September 1, 2010, Dewitt granted Vettraino’s request and released redacted copies of the initial and supplemental investigative reports, as well as an unredacted copy of the April 15, 2010, executive summary.

On September 3, 2010, Vettraino sent a letter to Dewitt requesting the basis for the redactions made to the investigative reports. Dewitt responded that to “carry out the request of the Dewitt Public Schools Board of Education, the names and identifying characteristics” of witnesses were redacted. Vettraino then inquired about the statutory basis for the redactions, and Dewitt informed her that the investigator-client privilege³ applied to the investigative reports.

Vettraino filed a complaint pursuant to the FOIA seeking unredacted copies of the investigative reports. She then filed a motion for summary disposition⁴ that argued that while the investigative reports were originally exempt from disclosure under the FOIA because of the investigator-client privilege, Dewitt’s partial disclosure of the reports waived the privilege and made them subject to the FOIA. The trial court granted the motion.⁵

Dewitt argues that the trial court erred in granting summary disposition in favor of Vettraino. We agree.⁶ A motion brought under MCR 2.116(C)(9) is “tested by the pleadings alone, with the court accepting all well-pleaded allegations as true.”⁷ Summary disposition under this subrule is proper when “[t]he opposing party has failed to state a valid defense to the claim asserted against him or her.”⁸ Summary disposition is warranted “[w]here the nonmoving party’s defenses are ‘so clearly untenable as a matter of law that no factual development could

³ MCL 338.840.

⁴ MCR 2.116(C)(9) and (C)(10).

⁵ *Id.*

⁶ Although the trial court’s order indicates that Vettraino’s motion for summary disposition was granted pursuant to MCR 2.116(C)(9) and (C)(10), it may be resolved on the pleadings alone as the material facts are undisputed. Thus, this Court’s review will be pursuant to MCR 2.116(C)(9).

⁷ *Grebner v Clinton Charter Twp*, 216 Mich App 736, 740; 550 NW2d 265 (1996).

⁸ MCR 2.116(C)(9).

possibly deny plaintiff's right to recovery[.]”⁹ A trial court's decision regarding a motion for summary disposition is reviewed by this Court de novo.¹⁰

All public records are subject to full disclosure under the FOIA unless the material is specifically exempted from disclosure.¹¹ A public body may exempt from disclosure any information or records subject to a privilege recognized by statute or court rule.¹² Under the investigator-client privilege any material gathered by a licensed investigator in connection with an assignment for a client “is considered privileged with the same authority and dignity as are other privileged communications recognized by the courts of this state.”¹³ Thus, the information gathered by a licensed investigator in connection with an assignment for a client is exempt from disclosure under the FOIA.

Here, it is undisputed that the investigative reports were gathered by a licensed investigator in connection with an assignment for a client. As such, the investigative reports were originally exempt from disclosure.¹⁴ Vettraino asserts, however, that the unredacted reports are subject to disclosure under the FOIA because Dewitt's partial disclosure waived the exemption. The subject of redactions was addressed by our Supreme Court in *Bradley v Saranac Community Sch Bd of Ed.*¹⁵ The *Bradley* Court held the following regarding the appropriateness of redactions:

Redaction is appropriate whenever disclosure is discretionary. This means that a public body is permitted to redact any information that falls within an exemption of the FOIA. For example, if details in the plaintiffs' files had revealed “intimate or embarrassing details of the plaintiff's private lives,” such as information relating to a medical condition, redaction would be appropriate.¹⁶

The Court went on to examine the substance of the redacted portions of the record and found that the redactions were “extensive, to say the least.”¹⁷ The Court explained that the FOIA “entitles all persons to ‘full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and public employees’” and that

⁹ *Grebner*, 216 Mich App at 740 (citation omitted).

¹⁰ *Id.*

¹¹ MCL 15.243.

¹² MCL 15.243(1)(h).

¹³ MCL 338.840(2).

¹⁴ *Id.*

¹⁵ *Bradley v Saranac Community Sch Bd of Ed*, 455 Mich 285; 565 NW2d 650 (1997).

¹⁶ *Id.* at 304.

¹⁷ *Id.*

redactions so extensive were “entirely at cross purposes with the FOIA.”¹⁸ “One purpose of the FOIA is to allow citizens to obtain information about their government so that they may more fully participate in the democratic process.”¹⁹ Thus, information exempt from disclosure may be redacted by a public body, but not if such redactions are at “cross purposes” with the intent of the FOIA and render the informative value of the redacted document “nil.”²⁰

The holding in *Bradley* is also in concert with federal cases examining the FOIA.²¹ In *Cooper v Dep’t of the Navy*, the Fifth Circuit held that the disclosure of one of four endorsements to an aircraft accident report waived the FOIA exemption from disclosure only for that endorsement, and not for the remaining endorsements or for the body of the report.²² Similarly, in *American Civil Liberties Union v Dep’t of Defense*, the District of Columbia Circuit upheld the redaction of material subject to a FOIA exemption in documents disclosed in response to a FOIA request.²³

Based on the general treatment of privilege and redactions by both the state and federal cases applying the FOIA, we find that the trial court’s position on waiver was overly broad. Dewitt was permitted to redact information that was exempt from disclosure based on the investigator-client privilege so long as the redactions did not undermine the spirit of the FOIA or distort the informative value of the disclosed portions of the report.²⁴ Here, Dewitt offered to provide unredacted copies of the reports to the trial court for review, but the trial court declined. Because the trial court failed to review the unredacted reports and this Court does not have access to the unredacted reports, it is unclear whether the redactions undermined the spirit of the FOIA or compromised the informative value of the disclosed portions of the investigative reports.²⁵ As such, we reverse the trial court’s orders and remand the case to the trial court for reconsideration of Vettraino’s motion and an in camera examination of the unredacted investigative reports to determine whether any redactions other than the names and identifying

¹⁸ *Id.* (emphasis omitted).

¹⁹ *Id.* at 304-305.

²⁰ *Id.*

²¹ Federal cases are not binding authority on this Court, but our Supreme Court has held that “federal law is generally instructive in FOIA cases.” *Mich Federation of Teachers & Sch Related Personnel, AFT, AFL-CIO v Univ of Mich*, 481 Mich 657, 679 n 60; 753 NW2d 28 (2008).

²² *Cooper v Dep’t of the Navy*, 594 F2d 484, 487-489 (CA 5, 1979).

²³ *American Civil Liberties Union v Dep’t of Defense*, 393 US App DC 384, 398; 628 F3d 612 (2011).

²⁴ *Bradley*, 455 Mich at 304-305.

²⁵ *Id.*

characteristics of the witnesses affected the informative value of the unredacted portions of the reports and the intent of the FOIA.²⁶

Dewitt also asserts that reversal is warranted because Vettraino failed to demonstrate a public purpose for the unredacted reports sufficient to outweigh the witnesses' right to privacy. This issue is not properly before this Court as it was not included in Dewitt's statement of the questions involved.²⁷ For that reason and because this Court does not have access to the unredacted reports to confirm the contents of the redacted information to properly consider the issue, this issue will not be addressed.²⁸ In light of this Court's disposition above, the trial court may reconsider this issue on remand.

While Dewitt further contends that the trial court improperly found that information obtained through investigations paid for by public dollars belongs to the public, we find it unnecessary to address this issue because of this Court's finding above.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Donald S. Owens
/s/ Michael J. Talbot
/s/ Patrick M. Meter

²⁶ *Id.*

²⁷ MCR 7.212(C)(5); *People v Anderson*, 284 Mich App 11, 16; 772 NW2d 792 (2009).

²⁸ *Id.*